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No. 89-24

In The

Supreme Court of the United States

October Term, 1989

MARY DANN AND CARRIE DANN,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Statement 1

Argument 2

As to First Question Presented 2

As to Second Question Presented 3

As to Third Question Presented 5

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Anderson Clayton Co. v. United States, 562 F.2d 972 (5th Cir. 1977) 6

Cramer v. United States, 261 U.S. 219 (1923) 7

Environmental Defense Fund v. Alexander, 467 F. Supp. 885 (D.C. Miss. 1979) 6

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) 5

Hansbury v. Lee, 311 U.S. 32 (1940) 4

Harris v. Lewis, 559 F. Supp. 943 (D.D.C. 1983) 5

Jackson Jordan Co. v. Plasser American Corp., 747 F.2d 1567 (C.A. Fed. 1984) 6

Lane v. Pueblo Santa Rosa, 249 U.S. 110 (1919) 6

Seminole Nation v. United States, 316 U.S. 286 (1942) 3

TVA v. Hill, 437 U.S. 153 (1978) 3

United States v. Dann, 470 U.S. 39 (1985) *(Dann)* . 2, 3, 8

United States v. Dann, 572 F.2d 222 (9th Cir. 1978) *(Dann I)* 1

United States v. Dann, 706 F.2d 919 (9th Cir. 1983) *(Dann II)* 1, 6, 7

United States v. Gammache, 713 F.2d 588 (10th Cir. 1983) 2

United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941) 7, 8

Western Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5 (1972) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

25 U.S.C. 70n (1976 ed.) 4

MISCELLANEOUS

F. Cohn, *Handbook of Indian Law* (1982 ed.) 8

Fed. Rule Civ. P. Advisory Committee Note to Amend Rule 23(c)(3) (1966) 5

Restatement (Second) of Judgments, Sec. 86 Comment (h), Sec. 116 5

E. Rusco, *The Organization of the Temoak Bands*, XXV Nevada Hist. Soc. Q. 175 (Fall 1982) 4

STATEMENT

The Brief for the United States, at p. 9, contains a serious, material misstatement of the record that " . . . the underlying aboriginal title issue . . . was fully litigated in the Commission action." The entire record of the claims proceeding, up through 1974, including transcripts of all proceedings, was introduced as evidence in this action. Exhibits 8-D through 11-D. The question of whether the extinguishment (or even "taking") of aboriginal title was actually litigated in the Commission was a central issue in *Dann I*, which held:

> Whatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided.

United States v. Dann, 572 F.2d 222, 226-27 (9th Cir. 1978). The government sought to modify that holding in *Dann II* but the court of appeals reaffirmed it as the law of the case. 706 F.2d 919, 923-24 (9th Cir. 1983). And in the decision below, the court of appeals, citing its earlier holdings stated that "[i]t is true that the taking was not actually litigated . . . " Pet. App. 20.

The government's statement that "the underlying aboriginal title issue . . . was fully litigated in the Commission action" is simply not true. As explained in the Petition at 11-14, 18-20, there was no party or representative before the Commission with an interest in disputing that the aboriginal title was taken, particularly with regard to the subject lands continuously occupied by the Dann Band.

ARGUMENT

As to the First Question Presented

The Brief for the United States fails to address any of the issues which the Petition contends the court of appeals incorrectly held were precluded by the Court's prior opinion in *United States v. Dann*, 470 U.S. 39 (1985). It simply argues generally that the court of appeals was correct in concluding that the effect of that decision "is that Western Shoshone tribal title may no longer be asserted against the United States *under any circumstances*" Br. U.S. 8. (Emphasis added).

1. The Brief of the United States fails to explain how the complete discharge of all claims for past wrongs to Indians which it received in the Commission now gives it the right to demand the assistance of a court of equity to eject Indians whose lands it had neglected to steal in the past. The Danns are not making a claim of any kind against the United States by continuing to graze their cattle upon Western Shoshone lands any more than any of us are by our daily use and possession of our homes and other belongings. The discharge, as broad as it may be, is none-the-less a procedural bar against claims against the United States which has no effect upon Indians in continuous possession who have no need for a remedy against the government. That one in possession is barred from clearing title cannot alone justify ejectment by the beneficiary of the bar. *United States v. Gammache*, 713 F.2d 588 (10th Cir. 1933).

2. The Brief of the United States also fails to address the denial of the petitioners' right to present evidence that the government practiced, and had notice of, fraud

during and as a part of the ICC proceedings and knowingly breached the trust relationship in accepting the ICC award. This Court certainly did not hold in *Dann* that payment is effective notwithstanding fraud and breach of trust. Its reliance upon *Seminole Nation v. United States*, 316 U.S. 286 (1942), mandates the exact opposite conclusion. 470 U.S. at 49 and n.12.

3. Nor does the government state any justification for the court of appeals' sub silentio elimination of the district court's prerogative to limit the injunctive relief it gave the government on grounds of equity and good conscience. See Finding 25, Pet. App. 32.[1] This Court's decision in *Dann* certainly did not foreclose that chancellor's prerogative which the Court has always respected. See, *e.g.*, *TVA v. Hill*, 437 U.S. 153, 193-94 (1978).

As to the Second Question Presented

The Brief for the United States misconstrues the representative scheme in the claim proceeding and the due process argument of the Petition. *If* the present day land owning entity or some representative which had an interest in asserting the existing property interests of the entity had been before the Claims Commission,[2] then

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[1] While the court of appeals did not discuss this issue, it was raised and briefed by the parties in connection with the government's cross-appeal.

[2] During the pendency of the claims proceeding there was no organized entity which politically represented the Western Shoshone Nation. Earlier efforts by field representatives of the

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petitioners would not have had a right of access. However, that was not the situation. Only an undefined aggregation of individual descendants having an interest in a share of reparations for historical wrongs to their ancestors was actually represented through the Temoak Bands. Legal representation was financed by a contingency fee such that the attorneys for the undefined "group" were compensated in direct proportion to the amount of land they could show (or in this case simply agreed with the government) was taken. 25 U.S.C. 70n (1976 ed.). If the ICC was adjudicating titles and existing possessory rights, rather than merely quantifying reparation amounts, *some* party with an interest in protecting those titles and possessory rights should have been before the Commission. *Cf. Hansbury v. Lee*, 311 U.S. 32 (1940).

Neither the ICC nor the Court of Claims adequately addressed the constitutional due process issue of the Temoak Bands' ability to adequately represent all Western Shoshone interests in denying that intervention. The Court of Claims regarded the intervenor's constitutional argument as a "feint" which it disposed of on the

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Bureau of Indian Affairs to have the Traditional Council recognized under the Indian Reorganization Act as such an entity were overruled by mid-level bureaucrats who mistakenly believed that the Western Shoshone possessed no tribal lands. E. Rusco, *The Organization of the Temoak Bands*, XXV Nevada Hist. Soc. Q. 175 (Fall 1982). The majority of Shoshone who are dependent upon Western Shoshone tribal lands are not members of the Temoak Bands which for the most part represents urban Indians residing on Executive order lands. The Temoak Bands has never asserted jurisdiction over Western Shoshone aboriginal or treaty lands or claimed the authority to abandon any such lands. See Pet. 14, n.13.

grounds of latches. 531 F.2d 503-04.[3] It never addressed the problem that no entity having an interest in protecting existing property rights was before the Commission. Regardless of the determination made by the tribunals in the claims proceedings, a party facing preclusion from an earlier representative proceeding always has the right to challenge the adequacy of the representation in that proceeding. See, *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Harris v. Lewis*, 559 F. Supp. 943 (D.D.C. 1983); Fed. R. Civ. P. Advisory Committee Note to Amend Rule 23(c)(3) (1966); Restatement (Second) of Judgments, Sec. 86, Comment (h), Sec. 116.

As to the Third Question Presented

The Brief for the United States cites no authority for its proposition that, since the Temoak Bands stipulated that July 1, 1872 could be used as an average valuation date for convenience in determining the value of the Western Shoshone identifiable group claim in the ICC, that date should be used in this action as the actual date upon which Shoshone title to the specific lands used and occupied by the Danns was extinguished. Other than the court of appeals decision below that to do so would be "appropriate" there is no authority for the proposition that a stipulation entered for a limited purpose is binding for another purpose in collateral litigation. All authority

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[3] The latches argument advanced by the government (and the Court of Claims) might have some validity if there were a record that notice was given to parties in possession and an opportunity to be heard was afforded at some earlier date. There is no such record.

is to the contrary.[4] What is more, the Temoak Bands did *not* stipulate that tribal title was extinguished on that date as the government's brief suggests at p. 10, but only that the date could be used as the valuation date. See *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5,7 (1972).

The government's brief makes the preposterous argument that, even if tribal title was not effectively extinguished until 1979, the Danns would not be better off since individual aboriginal title can be established only with the consent of the government which withdrew its consent to occupation of the subject lands pursuant to the Taylor Grazing Act in 1934. The flaw in that argument is obvious. If Western Shoshone title to the subject lands was not extinguished until 1979, the Taylor Grazing Act, or other public land laws, did not apply to the subject lands before that date since they, as unextinguished aboriginal title lands of the Western Shoshone, were not public lands of the United States. *United States v. Dann (Dann II)*, 706 F.2d at 932; see, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). (Secretary of Interior enjoined from treating aboriginal lands as public lands.)

The court of appeals did not agree that, if extinguishment of the title to the subject lands had not occurred until payment in 1979, the Taylor Grazing Act would have applied to the Danns' occupation prior to 1979. That

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[4] See, *e.g.*, *Anderson Clayton Co. v. United States*, 562 F.2d 972, 990-93 (5th Cir. 1977); *Jackson Jordan Co. v. Plasser American Corp.*, 747 F.2d 1567, 1576 (C.A. Fed. 1984); *Environmental Defense Fund v. Alexander*, 467 F. Supp. 885, 904-05 (D.C. Miss. 1979).

court found that the Taylor Grazing Act applied only because it incorrectly concluded that this Court's decision in *Dann* not only compelled a finding that tribal aboriginal title was precluded by payment, but also a finding that the extinguishment to the subject lands occurred prior to 1946. It found that title might be extinguished by the application of that Act *only* because it needed some date, Pet. App. at 20, n.6, not because the Act met the legal standards set by this Court for extinguishment of aboriginal title. *E.g., United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353-54 (1941).

The district court below, on the other hand, concluded that, while assertion of tribal title was precluded after the United States was discharged by the payment, the law of the case, prior to payment, was that the tribal title to the lands occupied by the Danns' was unextinguished and their occupation at that time was with the knowledge and consent of the government.[5]

The predicate of individual aboriginal title as defined in *Cramer v. United States*, 261 U.S. 219 (1923) is "prior

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[5] Pet. App. 27, 28, 32-34. At any time before 1979, the government could not have ejected the Danns. The trespass damage claim for 1973-1974 was correctly dismissed by the Judgment of April 25, 1980 because prior to 1979 aboriginal title was unextinguished. CR-69. The government chose not to have this Court review the part of the decision of the court of appeals in *Dann II*, 706 F.2d at 928-33, which upheld the district court's ruling that there had been no extinguishment prior to the effect of the ICC discharge. Surely this Court did not intend to compel an ex post facto conversion of past occupation by the Danns which had been judicially determined to be lawful into trespass.

right" established before application of a conflicting grant. The fact that the Danns' prior right of occupancy derived from aboriginal title and was guaranteed by treaty rather than merely implied from a government regulation certainly did not weaken it.[6] As the Petition at 22-25 demonstrates, the Court's decision in *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), dictates the correct analysis for determining how and when Western Shoshone title was relinquished as well as how the *Danns* individual rights of occupancy survived. The government's brief, like the decision below, simply ignores *Santa Fe Pacific* in spite of the fact that the Court cited that case in remanding this case for the determination of the individual aboriginal rights of petitioners. *United States v. Dann*, 470 U.S. 39, 50, n.13 (1985).

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[6] The court of appeals appears to believe that individual Indians cannot establish a right to occupy tribal lands. See, Pet. App. 14. The authority cited there, however, merely states that individual Indians cannot convey tribal lands and might have difficulty enforcing their individual occupancy rights *against the tribe*, F. Cohn, *Handbook of Indian Law* 605-06 (1982 ed.). The same authority recognizes that tribal custom or law may, and usually does, give exclusive occupancy of particular tracts to individuals. *Ibid.* at 610. If tribal custom gives individual Indians the right of occupancy, as was the case here, that right can be asserted against the government. Otherwise, the government could eject individual Indians from tribal lands one by one until there was no tribe.

CONCLUSION

The Writ of Certiorari should issue to review whether the court below misinterpreted this Court's prior mandate and whether the decision below conflicts with decisions of this Court.

Respectfully submitted this 15th day of September, 1989.

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